

FCC MAIL SECTION

OCT 7 1992
Federal Communications Commission
Washington, D.C. 20554DISPATCHED BY
MM Docket No. 92-61

In re Applications of

LRB BROADCASTING File No. BPH-901218MI

DAVID WOLFE File No. BPH-901219MI

ZENITRAM File No. BPH-901220MG
COMMUNICATIONS, INC.For Construction Permit for
New FM Station, Channel 288A,
Brockport, New York

MEMORANDUM OPINION AND ORDER

Adopted: September 22, 1992; Released: October 7, 1992

By the Review Board: MARINO (Chairman), and
GREENE. Board Member ESBENSEN absent.

1. On June 29, 1992, Zenitram Communications, Inc. (Zenitram) filed an appeal, pursuant to 47 CFR § 1.301(b)(1), from the dismissal of its application for failure to file a timely notice of appearance and other documents required in comparative cases. See *Memorandum Opinion and Order*, FCC 92M-668, released June 12, 1992 (*Order*). A Joint Opposition was filed by the two remaining applicants on July 8, 1992. We affirm the dismissal *Order* of Administrative Law Judge Sippel (ALJ), which is supported by the record and Commission rules and precedent.

2. **BACKGROUND:** Concerned about delays in the comparative hearing process, the Commission in 1986 reaffirmed the broad discretion of ALJs to regulate the course of such hearings. *Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 (1986). It warned that "applicants' temporizing activities" would no longer be "indulged". *Id.* That admonition was applied by the ALJs and this Board in a plethora of subsequent individual cases, but the problem still was not abated. See, e.g., *Opportunity Broadcasting of Shreveport*, 6 FCC Rcd 5018 (Rev. Bd. 1991), and cases cited at 5020 note 3. Accordingly, in 1990 the Commission conducted comprehensive Rule Making proceedings and instituted new rules of practice to "Reform the Commission's Comparative Hearing Process to Expedite Resolution of Cases," *Report and Order*, 5 FCC Rcd 157 (1990), modified on reconsideration, 6 FCC Rcd 3401 (1991). In the *Report*, the Commission reiterated that delays in the conduct of comparative hearings among otherwise qualified applicants deprives the public of a valued service as well as the ultimate licensee from the opportunity of providing immediate service to its community. It prescribed "a number of procedural and organizational strategies intended to reduce the amount of time consumed by the process." *Report*, 5 FCC Rcd at 157. One of the

Commission's stated objectives was that an initial decision in a comparative case should be released within nine months of the hearing designation order. *Id.* Ample notice was given that cases designated for hearing after July 31, 1991 were to be governed by the strict and specific deadlines mandated by the Commission in its new rules. See generally *Opportunity Broadcasting of Shreveport*, *supra*, 6 FCC Rcd at 5019 n.2.

3. In the present case, Zenitram's application was consolidated for hearing with several other competing applicants by *Hearing Designation Order (HDO)*, 7 FCC Rcd 2291, released April 13, 1992. Specific notice was given in the *HDO*, at para. 15, that to avail itself of the opportunity to be heard, an applicant "shall, pursuant to Section 1.221(c) of the Commission's rules, in person or by attorney, within 20 days of the mailing of the Order file with the Commission" a notice of appearance. Section 1.221(c) provides that if an applicant fails to demonstrate "good cause" for the late-filed appearance "the application will be dismissed with prejudice for failure to prosecute."

4. The *HDO* also specifically mandated that within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules). All parties were notified that, in accordance with the Commission's Procedural Reform *Report and Order*, *supra*, "Failure to serve the required materials may constitute a failure to prosecute, resulting in the dismissal of the application." *HDO*, para. 15.

5. It is undisputed that Zenitram's notice of appearance (NOA) was due to be filed May 4, 1992, and that document productions and integration statements were due May 11, 1992. *Order*, para. 5. Zenitram's notice of appearance was not filed, however, until May 18, 1992, and the relevant documents were not exchanged until June 2, 1992, without explanation. *Order*, para. 8. The integration statement was filed on May 12, 1992, with an explanation that the ALJ, on careful review, found to lack credibility. See *Memorandum Opinion and Order*, FCC 92M-654, released June 10, 1992, striking late-filed integration statement.

6. On May 20, 1992, Zenitram's then-counsel filed the following "Report" regarding the late-filed notice of appearance, which we quote in full because it contains the major attempt to demonstrate "good cause" before the ALJ:

On Saturday, May 16, 1992, counsel for Zenitram received a document entitled "Non-Delivery Notice" ("the notice") from the courier which services had been retained for timely delivery of a package to the office of the Secretary of the Commission on May 4, 1992. The package contained, *inter alia*, Zenitram's post Hearing Designation Order "Notice of Appearance". The notice showed that the package was being held at the Washington National Airport near Washington D.C.

Counsel called the number listed on the notice for an explanation of the document, but could not get a response until Monday, May 18. From several phone conversations with courier personnel, it appears that the package was delivered to the Commission after

5:30 p.m. even though it was clearly marked to deliver before 5:30 p.m. Inexplicably at this point, the package has been held for two (2) weeks at the airport.

Zenitram's Notice of Appearance was served upon the Presiding Judge, other counsel, the Hearing Branch, and the Data Management Branch. Counsel requested that the package containing Zenitram's Notice of Appearance be delivered to the Commission immediately. Additional information is being sought by Zenitram as to this matter.

Zenitram further notices that prior to July 15, 1991, it properly paid its hearing fee, and filed a "Notice of Appearance and Payment of Hearing Fee" at that time. Moreover, it has filed a "Petition for Leave to Amend" and "Integration and Diversification Statement". Zenitram requests no relief in this pleading, but filed this Report to provide information.

7. In ruling on motions to dismiss Zenitram's application and related pleadings, the ALJ found that Zenitram had not established good cause for the delay, reasoning (*Order*, para. 10):

The duty to file on time is the applicant's and it cannot be delegated to a courier service. If it is factually accurate that Zenitram had hired a negligent courier service, then Zenitram suffers the consequences. *Cf. Hillebrand Broadcasting, Inc.*, 1 F.C.C. Rcd 419, 420 n.6 (Comm'n 1986) (application dismissed where failures were those of agent - attorney because a party will be bound by its agent's action and omissions). The lack of an affidavit from an allegedly errant courier raises a presumption against Zenitram that there was a negligent courier at fault, if ever there was a courier. Zenitram has the burden of persuasion which equates to showing good cause, a burden which could only be met by producing a written statement from the person or entity that was the bailee of the document that had failed to be delivered to the Commission. *Cf. Silver Springs Communications*, 3 F.C.C. Rcd 5049 (Review Bd 1988), *rev. den.*, 4 F.C.C. Rcd 4917 (1989) (good cause not shown where applicant merely asserted it had not received delivery of the HDO and therefore had defaulted on NOA and filing fee). In fact, the courier service is not even identified and no copy of an invoice or bill of lading was submitted so it is impossible for opposing counsel to check out the assertions of Mr. Emert [Zenitram's then counsel]. (Footnotes omitted.)

8. The ALJ further reviewed the circumstances in this case, guided both by the standards set forth by the Court in *Communi-Centre Broadcasting, Inc. v. FCC*, 856 F.2d 1551, 1554 (D.C. Cir. 1988), and the Commission's new reform procedures. First, he pointed to deficiencies in the explanation for the delay in filing, concluding that:

Zenitram's failure to file its NOA and related discovery documents on the prescribed dates without showing good cause with reliable evidence for failing to meet those dates, would warrant summary dismissal so that the case can move forward on schedule.

Order, para. 12. Second, the ALJ found that other parties to the case, the two competing applicants, suffered prejudice because of their inability to timely discover Zenitram's documents and integration plan, prerequisites for preparing for further discovery and trial. *Order*, para. 13. Finally, the ALJ held that Zenitram's default's imposed a substantial burden on the administrative system because "the time delays and the attendant uncertainties created" made it more difficult, if not impossible, to issue an initial decision "nine months from designation [as] intended by the Commission." *Order*, para. 14.

9. On appeal, Zenitram's new counsel attempts to shift the fault for the delay from a "negligent courier" to "attorney inattention," arguing that "(whichever the case may be) the outright dismissal of the Zenitram application is inordinately harsh." Appeal p. 2. It also contends that its failure to timely file an NOA "was a relatively minor technicality" and that "the slight delay in filing the second NOA had no prejudicial effect". Appeal, p. 3.

10. *DISCUSSION*: Zenitram's arguments are unavailing. Initially, no factual documentation has been offered for its new theory of attorney inattention. The legal authority on which the ALJ relied, *Hillebrand* and *Silver Spring*, *supra*, is applicable, whether the courier, counsel or applicant were at fault. In any event, the ALJ's reasoning is firmly supported by a longstanding Commission *Public Notice*, 58 RR 2d 1706, 1707 (1985), which warned that:

... in the future, applicants who wait until the eleventh hour to meet Commission deadlines will be held to assume the risk for almost all events which may occur to prevent timely filing. To minimize the risk, applicants should build into their schedules a reasonable margin of error in anticipation of circumstances which may cause delay

11. Zenitram received ample notice both in the Commission's general rules of practice and in the specific *HDO* in this case, *supra* para. 3, that if it failed to file a timely notice of appearance without good cause, "the application [could] be dismissed with prejudice for failure to prosecute." Here, the ALJ, having found good cause wanting for the late filing, would have been fully justified in summarily dismissing the application on that basis, standing alone, as prescribed by 47 CFR § 1.221(c). However, he extended his analysis and considered the facts before him, guided by the additional standards set out in the *Communi-Centre* case, *supra*, and the FCC's "new reform procedure". In this latter regard, we reject Zenitram's contention that the filing of an NOA was a technicality and had no prejudicial effect. The ALJ put into context the importance of the filing of a timely notice of appearance *after* designation for hearing under the new reform procedures adopted by the Commission:

Now it is required that five days after filing an NOA, parties must exchange documents which consist of twelve comprehensively identified classifications under the rules. *See* 47 C.F.R. §1.325(c)(1). That document exchange facilitates a prompt start on framing issues and preparing for deposition discovery. Zenitram was late by a factor of twenty two days. In addition, on the same fifth day after filing the NOAs, each comparative party must file and serve a Standard Integration Statement. 47 C.F.R. §1.325(c)(2).

That document is essential for determining at an early stage of the litigation how the parties are comparatively aligned which enables parties to assess settlement and to use it to prepare for discovery on such issues as the probability of the ability to carry out an integration proposal. Without the documents and the integration statement, the discovery efforts of [the competing applicants were stalled].

12. Here, Zenitram also defaulted on its obligations to timely produce the documents required by Section 1.325(c)(1) and to timely file the comparative integration statement required by Section 1.325(c)(2). Based on those defaults, the ALJ found that the other parties to the case suffered "substantial prejudice" because the defaults frustrated their efforts to complete discovery and prepare for hearing. *Order*, para. 13. Zenitram's argument that the other parties were not entitled to discovery because, when the ALJ struck its late filed integration statement it was precluded from presenting a comparative case, Appeal, p. 3, is not well grounded. The documents Zenitram was required by Section 1.325(c)(1) to produce, included, beyond its comparative case:

- (v) All bank letters and other financial documents with dollar amounts unexpurgated.
- (vi) All documents relating to the applicant's proposed transmitter site.

These documents are relevant to Zenitram's basic financial and transmitter site qualifications.

13. Counsel raises a collateral argument that, prior to designation for hearing, it paid the hearing fee and mailed a notice of appearance, Appeal, p. 3, and Exhibit 1, but this is a non-decisional matter, since the ALJ correctly found that this allegation, even if properly documented, would not advance Zenitram's case, which must be judged by the Commission's new procedures that require the filing of an "NOA after the case is set for hearing[;] Zenitram was [thus] required to follow the rules." *Order*, para. 9. We agree with the ALJ.

14. In sum, given the facts of this case, we cannot say that the ALJ abused his discretion in dismissing Zenitram's application. See Section 1.243(f) of the Commission's rules, 47 CFR §1.243(f) (ALJ regulates the course of the hearing). He correctly held that Zenitram failed to demonstrate good cause for its late-filed appearance, subjecting its application to immediate dismissal pursuant to Section 1.321(c). Additionally, Zenitram's Section 1.325(c)(1) and (2) defaults prejudiced the discovery rights of the competing applicants, and would have delayed the ALJ's efforts to resolve the case within the time established by the Commission's reform procedures. Dismissal of Zenitram's application (which was hollow of comparative substance, and of questionable basic qualifications) was justified by the Commission rules and precedent cited in the dismissal *Order*. Zenitram's reliance on *Nancy Naleszkiewicz*, 7 FCC Rcd 1797 (1992), and *Pan-American Broadcasting Co.*, 89 FCC 2d 167, 170 (Rev. Bd. 1982), for a contrary result is misplaced. *Naleszkiewicz* was not a comparative case subject to the "stricter standards" mandated by the comparative procedural reforms; moreover, *Naleszkiewicz* had not caused any discernible prejudice or procedural disruption. 7 FCC Rcd at 1800. *Pan-American* was decided a decade ago, and the Board has recently

recognized that the *dicta* cited by Zenitram has been "tempered" both by the Commission's warning in *Hillebrand*, *supra*, para. 2, and the admonition in *Opportunity Broadcasting of Shreveport*, *supra*, 6 FCC Rcd 3cd at 5019 para. 8, and note 2, that current cases are governed by the "strict and specific deadlines mandated by the new Commission practice."

15. ACCORDINGLY, IT IS ORDERED, That the Appeal filed June 29, 1992, by Zenitram Communications, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board